

the money is a deposit or a loan it is still recoverable. Suppose *A* owes *C* money. *A* asks *B* to pay *C*. *B* pays *C*. It would be ridiculous for *A* to say that he did not receive the money.

Section 66 of the Contracts Act, 1950, provides that where an agreement is discovered to be void, or when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it, or make compensation for it, to the person from whom he received it. Apart from this, sections such as 65, 71, 74, 75 and 76 also produce the same result. As was held by the Privy Council in *Menaka v. Lum Kum Chum*⁽⁴⁾ that the principle of section 66 was "a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation."

For the above reasons, the appeal should be allowed with costs. The proper order is that respondent be given leave to defend conditional upon his paying into court the sum of \$250,000 within one month from today.

Appeal allowed.

Solicitors: *Skrine & Co.; Sarabjit Jholl.*

**TAN KAH WICH & ORS. v.
DATUK PHUA CHENG LEONG & ORS.**

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. & Abdul Hamid J.) March 20 & June 2, 1979]
[Kuala Lumpur — Federal Court Civil Appeal
No. 130 of 1978]

Administrative Law — Societies — Rules of Association — Meetings — Extraordinary general meeting — President purporting to adjourn meeting — Meeting continued by remaining members — Whether meeting can revoke decisions of General meeting and Committee — Power to elect new committee members — Declaration — Injunction to restrain — R.S.C. 1957, O. 25 r. 2.

Societies — Rules of Association — Extraordinary General Meeting called to discuss certain matters — Chairman adjourning meeting and leaving it — Whether members can decide to continue with meeting — Whether Extraordinary General meeting can revoke former decisions of Annual General Meeting and committee — Whether incumbent Committee or any of its members can be removed — Whether resolutions or any of them void.

This was an appeal from the decision of Abdul Razak J., reported at [1979] 1 M.L.J. 254. An extraordinary general meeting of the association had been called to discuss certain matters which had been decided by the Committee and Annual General Meeting, to pass a vote of no confidence in the incumbent committee and to elect fresh committee members. The meeting was adjourned by the Chairman while the first item was under discussion and he and a few members left the meeting. The other members decided to continue the meeting and resolutions were passed revoking the earlier decisions of the Committee and General meeting, expressing no confidence in the incumbent committee and electing fresh committee members. The learned trial judge held that the meeting which had been continued after the departure of the President was properly so continued but he held that the meeting had no power to pass the resolutions, which he declared null and void. He also granted an injunction to restrain the appellants from enforcing the resolutions or interfering with the respondents in their use or enjoyment of the offices of the Society. The appellants appealed.

Held: (1) the power to adjourn a meeting is at common law vested in the meeting itself and nothing in the Constitution of the Society invests the President with the power to

adjourn the meeting at his whim and fancy;

(2) the Special General meeting which the remaining members continued after the President left was a valid meeting;

(3) although the meeting had power to revoke former decisions of the committee or General meeting and to adopt a motion of no confidence, it had no power to remove the Committee members;

(4) there was sufficient cause for the learned trial judge to make the declaration and grant the injunction he did and therefore the appeal must be dismissed.

Cases referred to:-

- (1) *Lee v. Showmen's Guild of Great Britain* [1952] 2 Q.B. 329 at p. 342.
- (2) *Baker v. Jones & Ors.* [1954] 2 All E.R. 553.
- (3) *Ken v. Wilkie* (1860) 1 L.T. 501.
- (4) *Stoughton v. Reynolds* (1736) 2 Strange 1044.
- (5) *National Dwellings Society v. Sykes* [1894] 3 Ch. 159.
- (6) *Catesby v. Burnett* [1916] 2 Ch. 325.

FEDERAL COURT.

Mahinder Singh for the appellants.

Datuk Morris Edgar for the respondents.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): In the action of the court below the plaintiffs who claimed to be the legally appointed President and Committee Members of the Kuantan Kheng Chew Wooi Kuan Society (hereinafter referred to as the "Society") sought to obtain a declaration that (a) the resolution made by defendants purporting at the Special General Meeting to appoint themselves President and Committee Members of the Society was null and void and (b) an injunction to restrain defendants in such capacity from enforcing the said resolutions or interfering with plaintiffs in their use or enjoyment of the offices of the Society.

Defendants had earlier obtained an *ex parte* interim injunction to restrain the plaintiffs from acting as the office bearers of the Society.

The parties eventually agreed that since major issues of fact were not in dispute and that only questions of law were involved such questions could be decided in accordance with Order 25 rule 2 of the Rules of the Supreme Court, that no evidence would be called. Written submissions were subsequently filed.

The "Preliminary Issue" reads as follows:

"Whether the Special General Meeting of the 'Kuantan Kheng Chew Wooi Kuan' which was continued by the members after the President left it on October 30, 1977 was a valid meeting of the said association and even if such meeting was valid whether the Resolutions or any of them were valid."

It would appear that commencing from April 1977 twelve members of the Society had signed a requisition for a Special General Meeting to decide on the site of an electrical substation to service certain newly constructed shophouses owned by the Society. After three such requisitions and a letter from the Registrar of Societies asking 1st plaintiff to hold such meeting, the meeting was convened on October 30, 1977, and defendants circulated the following agenda to members:

- "1. To decide the site for the Electrical sub-station.
2. To revoke the decision of the present committee in appointing the new Building sub-committee and that the Former Building sub-committee do remain.
3. To pass a vote of no confidence in the present 21 committee members.
4. To elect 21 fresh committee members for the remainder of the term till February, 1978."

When the time came for voting on item (1) on the agenda i.e. to decide on the site for the Electrical sub-station, the 1st plaintiff (the President) refused to allow voting and when certain members insisted on a vote being taken, he walked off saying that the meeting was adjourned.

The meeting then continued with 93 members out of the original 140 remaining (see list on pages 49 to 51). Plaintiffs' Minutes at page 124 claims however that 189 members had originally turned up. However since the question of lack of quorum was never raised in the court below, nor at the appeal it would be safe to assume that the only requirement (see Article 11(b)) in the circumstances for this Special General Meeting to be valid i.e. a minimum of 2/3 of the members requesting the meeting, had indeed been met. First defendant was then elected Chairman, and the meeting passed 4 resolutions unanimously viz:

- "1. The Meeting resolves that the Substation be placed outside the present shophouses.
2. This Meeting do hereby revoke the decision of the present Committee in appointing the new Building Sub-committee and reinstate the Original Building Sub-committee headed by Mr. Dan Sin Wah, PJK.
3. That this Meeting no longer have confidence in the present 21 Committee Members.
4. That this Meeting amend Item 4 of the Agenda and elect 11 fresh Committee members for a term of 3 clear months for this date, with the power, duties and responsibilities of a normal Committee to look after the affairs of the Association and to prepare for the amendment of the Constitution and to prepare and call for a new election to elect new office bearers before the expiry of the term."

The learned trial judge held that the meeting which had been continued after the 1st plaintiff's departure was properly so continued. It was his Lordship's view that the mere fact that a chairman, among whose duties is the control of a meeting, flees because he found it agitative and restless does not turn that meeting thereafter into an improper and illegal one.

Having arrived at that conclusion, he proceeded to consider whether the resolutions or any of them were invalid. The learned judge could not find any provision in the constitution which allowed them to do so. He referred to the powers given to the committee under Article 13(a) to execute the resolutions of the committee, (b) to plan the activities of the Society. He likened a society to a partnership or a company in so far as how men should conduct themselves towards each other in their internal affairs, citing by analogy a passage in *Halsbury's Laws of England* Vol. 6, 3rd Edn. at page 298. Just as the Articles of Association of a company is a contract between the members *inter se*, so, held his Lordship, is the constitution a contract between the members of a Society, and short of misconduct or fraud by the committee the courts should not interfere. He

A found that the committee had committed none but was merely carrying out the resolutions of the (presumably earlier) General Meeting as regards the siting of the substation, which was the root of the hostilities between these two factions.

B He held that there was no power in the other members to revoke the decision of this committee and that it followed that they were not competent to pass the other resolutions. (His disposal of the other arguments advanced by defendants see Judgment — pages 22 F2 to 24 D3).

His Lordship therefore declared the four resolutions made by the defendants null and void, and made a consequential order.

C With the learned trial judge's finding of law as regards the effect of the constitution or rules of the Association on members, we would with respect agree. On pages 5 and 6 of the Sixth Edition of *Shackleton on The Law and Practice of Meetings* appears the following passage. "In the case of unincorporated associations such as clubs, trade unions, professional societies and the like, the rules as adopted between the members *inter se* are the source of the regulations to be applied in their members' meetings, and though such rules do not possess the force of law given to the rules of incorporated bodies by virtue of the incorporating statute, they are enforceable as terms of the implied contract involved in the fact of membership."

E Sometimes, not only when rules are silent on some point, but where they appear to operate unfairly, it is possible for the courts to have regard to the principles of natural justice in order to reach a decision in a disputed situation."

F A decision in this matter would depend solely on interpretation of the rules of the Association. It is well to remember as was held in *Lee v. Showmen's Guild of Great Britain*,⁽¹⁾ that construction of the rule is always a question of law. See also *Baker v. Jones & Ors.*⁽²⁾

G Bearing these principles in mind let us examine the arguments advanced by counsel on both sides. Mr. Mahinder Singh for the appellants/defendants says that Articles 11 and 12, which are reproduced below are the key Articles:—

- "Art. 11(a) Annual General Meeting is fixed to be held in the month of February. A minimum of 25 members must be present at an Annual General Meeting for its proceedings to be valid.
- H (b) Special General Meetings must be called by the President within two weeks at the request in writing by 10 or more members or upon resolution of the Committee. A minimum of two-thirds of the members requested the meeting must be present for the proceedings to be valid. Quorum for special general meeting shall also be 25 members.
- I (c) Committee Meetings shall be held every month. A number of 11 Committee Members must be present for the proceeding to be valid. In the event of less than 11 Committee Members present, the President shall postpone the Committee Meeting for one week and during which time any number of the Committee members present, the proceeding shall be considered valid.
- (d) If half an hour after the time appointed for an annual general meeting or special general meeting a quorum is not present the meeting shall be postponed to a date

(not exceeding 30 days) to be decided by the Committee; and if a quorum is not present half an hour after the time appointed for the postponed meeting, the members present shall have power to proceed with the business of the day but they shall not have power to alter the rules of the Association or to make decisions affecting the whole membership. However, in the case of a special general meeting requisitioned by members of the Association if no quorum is present half an hour after the time appointed for the meeting, then the meeting shall forthwith be cancelled and no special general meeting shall be requisitioned for the same purpose until after the lapse of at least six months for the date thereof.

Art. 12 Constitutional Rights of the General Meeting and Special General Meeting are as follows:—

- (a) Amending the rules of this Association;
- (b) Electing the Committee members and two auditors if necessary;
- (c) To consider and accept the Annual Report of the Committee and the General accounts and financial reports;
- (d) To consider and approve this Association's Annual Budget;
- (e) To consider and resolve on any other items whether or not it is on the Agenda;
- (f) To elect or replace trustees of this Association, if necessary;
- (g) To consider, sell, mortgage or develop this Association's property or to acquire properties;
- (h) Under sound financial circumstances, to consider introducing academic loans or rewards to University level for which separate by-laws shall be drafted and submitted to the Registrar of Societies for approval."

It is not disputed that a requisition for a Special General Meeting was duly made in accordance with Article 11(b). It was argued that Article 12(b) gave the Special General Meeting the constitutional right of electing the committee members and 2 auditors if necessary. This he says when read together with Article 12(e) empowers a Special General Meeting "to consider and resolve on any other items whether or not it is on the agenda".

However we are of the view that Article 11(b) should be read in conjunction with Article 28 and Article 30. Article 28 provides, "New committee members shall be elected at the General Meeting one month before the expiration of the term of office of the existing committee." Article 30 reads, "The term of office of the committee will be 2 years and may be re-elected except the Treasurer and Auditors."

For the respondents it was argued that the *Annual General Meeting* is the highest authority of the Society, the Special General Meeting being inferior to it. Once the President declared a meeting closed, respondents say that it cannot continue without his being present since Article 14(c) states that "the duties of the President include presiding at all meetings."

We are unable to agree with this view. Reading Chapters Three and Four of the Rules and Constitution together it will be seen that both Annual General Meeting and the Special General Meeting are Members' General Meeting, and the fact that office bearers, including the President can only be elected at the Annual General Meeting makes no difference as to the status of these two types of Members General Meeting.

It not being in dispute that the Special General Meeting had been called in accordance with the Rules,

A and for the purposes shown on the agenda, the President had purported to adjourn the meeting and left the meeting with most of the members of his committee when the requisitioners of the Special General Meeting called for a vote on the siting of the electrical substation, item 1 on the agenda. No doubt Article 15 allows the Vice President to act during the President's absence, so that the former may preside had he been present and remained after the President's departure. Presumably he was himself either absent from the start or had followed his superior when the latter departed. The Rules are silent as to who should preside in such circumstances, but plainly, the Special General Meeting properly called cannot be adjourned merely because the President could not have his own way on the very matter which had compelled certain members to convene the Special General Meeting.

The position at common law is that there is a power to adjourn a meeting — *Kerr v. Wilkie*.⁽³⁾ This right is vested in the assembly itself, unless there are particular regulations which vest this power in the chairman. In the present case nothing in the constitution invests the President with the power to adjourn the meeting at his whim and fancy.

The following three cases define the rights of the remaining members at common law where the chairman had, neglectful of his duties, taken a course contrary to the interest of the majority present at the General Meeting.

In *Stoughton v. Reynolds*,⁽⁴⁾ a vestry meeting was held for the election of churchwardens at which the vicar presided. Before the election was completed, however, the vicar at the desire and with the consent of his nominee, adjourned the meeting, against the wish of many present, and the latter remained behind and completed the poll. It was held that the right of adjournment was in the parish at large and the power must arise from the common law, which is in the whole assembly where all are upon an equal footing.

In *National Dwellings Society v. Sykes*,⁽⁵⁾ an ordinary general meeting of the society was called for the purpose of passing the accounts; considering reports; and electing auditors. The chairman moved the formal motion: "That the report and accounts be received." This was seconded by another member of the society, but several members wished to move, in lieu thereof, a motion appointing a committee of investigation. The chairman refused to admit this motion for the reason that there was no express notice, and he thereupon put the former motion to the vote, and on this being lost, declared the result and closed the meeting. The members remaining elected another chairman to transact the business left unfinished, and at an adjourned meeting the appointment of a committee of investigation was approved. It was held that the chairman in leaving the meeting at his own will and pleasure was not acting within his power, and the meeting by itself could resolve to go on with the business for which it had been convened and appoint a chairman to conduct the business which the other chairman, forgetful of his duty, had tried to

stop because the proceedings had taken a turn he did not like.

In *Catesby v. Burnett*,⁽⁶⁾ a general meeting of a company was called for the transaction of ordinary business, but owing to considerable opposition among the members present the meeting was adjourned, the only item of business transacted being the appointment of a committee of five shareholders to investigate the affairs of the company. At the adjourned meeting there was much hostility towards the chairman (the defendant) who left the meeting when only the appointment of the auditors had been approved. Those remaining thereupon continued the business of the meeting and elected two directors in the places of those who should have retired. The proceedings, after the chairman had left the meeting, were in certain respects irregular, but in the events that had happened it was held that the two retiring directors, one of whom was the defendant, ceased to be directors, on the date of the adjournment, and that the appointment of the two new directors was valid.

On the strength of these authorities we would hold that the Special General Meeting which the remaining members continued after the President left it on October 30, 1977 was a valid meeting.

Were the resolutions or any of them valid?

The first item on the agenda at this continued meeting was to decide upon the site for the electrical sub-station.

It is not at all clear whether a resolution on the sub-station had been taken by the Building Subcommittee appointed by the Committee, but it would appear from plaintiffs' version of the Minutes of that fateful meeting (before adjournment) that the Subcommittee had recommended that the sub-station be sited within one of the shophouses and that the recommendation was adopted by the General Meeting on February 18, 1973.

Be that as it may, it seems to us consonant with the practice of meetings that the later Special General Meeting being of like status can revoke former decisions made at either a previous Annual General Meeting so that Resolutions 1 and 2 are valid. Nor can we find any lack of power in a Special General Meeting to make a resolution indicating its dissatisfaction with the general performance of the existing committee. We therefore find that Resolution 3 is also valid.

We should add that a vote of no confidence, as a mere expression of loss of faith in the ability of the existing Committee to perform its functions satisfactorily cannot affect our decision on the fourth resolution. Here we agree with counsel for the respondents that Articles 11(b) should be read in conjunction with Articles 28 and 30 (*supra*).

Indeed, if the Special General Meeting wished to proceed with their intention of removing the Committee they would have to obtain the votes of 2/3 of the members present to an amendment to the rules, in accordance with Article 38 enabling a Special General Meeting to remove all or any particular member of an incumbent Committee and to appoint replacement or replacements thereto and submit such

A amended rules to the Registrar of Societies under section 11(1) & (2) of the Societies Act, wait out the statutory period (3 months), call another Special General Meeting and then carry out their original intentions.

Nothing short of that will make the resolution valid.

B To sum up, we would with the deepest respect disagree with the finding of the learned judge in respect of the first three resolutions, but find that his decision on the fourth resolution to be correct. This was sufficient for him to make the declaration and grant the injunction. As the term of office of the Committee has now expired the granting of that injunction would only be of academic interest. We therefore discharge the injunction. Respondents are however entitled to a declaration that the fourth resolution made at the Special General Meeting i.e. "That this Meeting amend Item 4 of the Agenda and elect 11 fresh Committee members for a term of 3 clear months from this date, with the power, duties and responsibilities of a normal Committee to look after the affairs of the Association and to prepare for the amendment of the Constitution and to prepare and call for a new election to elect new office bearers before the expiry of the term" is null and void.

D We defer making any order as to costs pending consideration of written submissions on that matter to be submitted by counsel for both parties.

Order accordingly.

Solicitors: *Mahinder & Co.; Datuk Morris Edgar & Co.*

CHONG AH CHAI & ORS. v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Syed Othman & Ibrahim Manan F.JJ.)
June 8, 1979]

[Kuala Lumpur — Federal Court Criminal Reference
No. 3 of 1978]

G *Criminal Law and Procedure — Attempted theft of a cement mixer — Cement mixer not produced at trial — Whether accused can be convicted of offence.*

Penal Code, ss. 379 & 511 — Theft — Attempted theft of cement mixer.

H In this case the accused persons were accused of attempted theft of a cement mixer. At the trial before the Magistrate's Court the cement mixer was not produced, but the prosecution stated that it could be viewed at the site if necessary as it was too heavy to carry to the court. There was evidence to show that the cement mixer had been meddled with and the cement mixer was seen by the investigation officer in the presence of the accused. Photographs were also taken of the cement mixer and these were produced in court. The accused were convicted and their appeal to the High Court was dismissed. On the application of the accused, the High Court referred the following question for the determination of the Federal Court — "Whether an accused person charged for an offence of theft or attempted theft of property can be found guilty and convicted in law where the prosecution has not produced the said property at the trial or marked it as an exhibit."

I **Held:** the question referred to the court must be answered in the affirmative. It could not be said in this case that there was any material break or gap in the chain of evidence